

FREEDOM OF INFORMATION ACT PROCEDURES

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Sec.

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§517.1 Purpose and scope.

This part contains the regulations of the National Indian Gaming Commission implementing the Freedom of Information Act (FOIA). These regulations provide procedures by which members of the public may obtain access to records compiled, created, and maintained by the Commission, along with procedures the Commission must follow in response to such requests for records.

§517.2 Definitions.

(a) *Commercial-use requester* means requesters seeking information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, the Commission shall determine the use to which a requester will put the documents requested. Where the Commission has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, the Commission shall seek additional clarification before assigning the request to a specific category.

(b) *Confidential commercial information* means records provided to the government by a submitter that arguably contain material exempt from disclosure under Exemption 4 of the FOIA, because disclosure could reasonably be expected to cause substantial competitive harm.

(c) *Direct costs* means those expenditures by the Commission actually incurred in searching for and duplicating records to respond to a FOIA request. Direct costs include the salary of the employee or employees performing the work (the basic rate of pay for the employee plus a percentage of that rate to cover benefits) and the cost of operating duplicating machinery. Direct costs do not include overhead expenses, such as the cost of and heating or lighting of the facility in which the records are stored.

(d) *Duplication* refers to the process of making a copy of a document necessary to fulfill a FOIA request. Such copies can take the form of, among other things, paper copy, microform, audio-visual materials, or machine-readable documentation. The copies provided shall be in a form that is reasonably usable by requesters.

(e) *Educational institution* refers to a preschool, a public or private elementary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, and an institution of vocational education, which operates a program of scholarly research.

(f) *Freedom of Information Act Officer* means the person designated by the Chairman to administer the FOIA.

(g) *Non-commercial scientific institution* refers to an institution that is not operated on a "commercial" basis as that term is used in §517.2(a), commercial-use requester, and which is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry.

(h) *Representative of the news media* refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that would be of current interest to the public.

(i) *Requester* means any person, including an individual, Indian tribe, partnership, corporation, association, or public or private organization other than a Federal agency, that requests access to records in the possession of the Commission.

(j) *Review* refers to the process of examining a record, in response to a FOIA request, to determine whether any portion of that record may be withheld under one or more of the FOIA

Exemptions. It also includes processing of any record for disclosure, for example, redacting information that is exempt from disclosure under the FOIA. *Review* does not include time spent resolving general legal or policy issues regarding the use of FOIA Exemptions.

(k) *Search* refers to the time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within a document. The Commission shall ensure that searches are conducted in the most efficient and least expensive manner reasonably possible.

(l) *Submitter* means any person or entity who provides information directly or indirectly to the Commission. The term includes, but is not limited to, corporations, Indian tribal governments, state governments and foreign governments.

(m) *Working day* means a federal workday that does not include Saturdays, Sundays or federal holidays.

§517.3 Requests for records.

(a) Form of requests.

Requests for records made pursuant to the FOIA may be in writing, specifically invoke the Act, and be addressed to the FOIA Officer, Suite 250, 1850 M St., NW., Washington, DC 20036-5803. Requests may also be made in person at the same address, where records will be available for inspection on the premises. Requests for records shall describe the records requested with enough specificity to enable Commission employees to locate the information requested with a reasonable amount of effort. Requests shall also include a statement of the maximum amount of fees the requester is willing to pay to obtain the requested information, or if a waiver or reduction of fees seems appropriate, the reasons for such waiver or reduction.

(b) Types of records not available.

The FOIA does not require the Commission to:

- (1) Compile or create records solely for the purpose of satisfying a request for records;
- (2) Provide records not yet in existence, even if such records may be expected to come into existence at some future time; or

(3) Restore records destroyed or otherwise disposed of, except that the FOIA Officer must notify the requester that the requested records have been destroyed or disposed of.

§517.4 Disclosure of requested records.

(a) The FOIA Officer shall make requested records available to the public to the greatest extent possible in keeping with the FOIA, except that the following records are exempt from the disclosure requirements:

(1) Records specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and which are, in fact, properly classified pursuant to such Executive order;

(2) Records related solely to the internal personnel rules and practices of the Commission;

(3) Records specifically exempted from disclosure by statute (other than 5 U.S.C. §552(b)) provided that such statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue or that the statute establishes particular criteria for withholding information or refers to particular types of matters to be withheld;

(4) Records containing trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the Commission;

(6) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:

- (i) Could reasonably be expected to interfere with enforcement proceedings;
- (ii) Would deprive a person of a right to a fair trial or an impartial adjudication;
- (iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a State, local or foreign agency or authority or any private institution which furnished information on a confidential basis, and in the case of a recorded or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source;

(v) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(vi) Could reasonably be expected to endanger the life or physical safety of any individual.

(8) Records contained in or related to examination, operating, or condition reports prepared by, or on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(9) Geological or geophysical information and data, including maps, concerning wells.

(b) If a requested record contains exempted material along with nonexempted material, all reasonable segregable nonexempt material shall be disclosed.

(c) The FOIA Officer may disclose requested information falling within the exemptions of paragraphs (a)(1)-(a)(3), (a)(5), (a)(6), (a)(8) and (a)(9) of this section, if to do so would further the purposes and policies of the FOIA and the IGRA. The FOIA Officer shall not disclose requested information falling within the exemptions of paragraphs (a)(4) and (a)(7) of this section.

§517.5 Confidential commercial information.

(a) *Notice to submitters.* The Commission shall, to the extent permitted by law, provide a submitter who provides confidential commercial information to the Commission, with prompt notice of a FOIA request or administrative appeal encompassing the confidential commercial information if the Commission may be required to disclose the information under the FOIA. Such notice shall either describe the exact nature of the information requested or provide copies of the records or portions thereof containing the confidential commercial information. The

Commission shall also notify the requester that notice and an opportunity to object has been given to the submitter.

(b) *When notice is required.* Notice shall be given to a submitter when:

(1) The information has been designated by the submitter as confidential commercial information protected from disclosure. Submitters of confidential commercial information shall use good faith efforts to designate, either at the time of submission or a reasonable time thereafter, those portions of their submissions they deem protected from disclosure under Exemption 4 of the FOIA because disclosure could reasonably be expected to cause substantial competitive harm. Such designation shall be deemed to have expired ten years after the date of submission, unless the requester provides reasonable justification for a designation period of greater duration; or

(2) The FOIA Officer has reason to believe that the information may be protected from disclosure under Exemption 4 of the FOIA.

(c) *Opportunity to object to disclosure.* The Commission shall afford a submitter a reasonable period of time to provide the Commission with a detailed written statement of any objection to disclosure. The statement shall specify all grounds for withholding any of the information under any exemption of the FOIA, and if Exemption 4 applies, shall demonstrate the reasons the submitter believes the information to be confidential commercial information that is exempt from disclosure. Whenever possible, the submitters claim of confidentiality shall be supported by a statement or certification by an officer or authorized representative of the submitter. Information provided by a submitter pursuant to this paragraph may itself be subject to disclosure under the FOIA.

(d) *Notice of intent to disclose.* The FOIA Officer shall carefully consider a submitter's objections and specific grounds for nondisclosure prior to determining whether to disclose the information requested. Whenever the FOIA Officer determines that disclosure is appropriate, the FOIA Officer shall, within a reasonable number of days prior to disclosure, provide the submitter with written notice of the intent to disclose which shall include a statement of the reasons for which the submitter's objections were overruled, a description of the information to be disclosed, and a specified disclosure date. The FOIA Officer shall also notify the requester that the requested records will be made available.

(e) *Notice of lawsuit.* When a requester brings suit seeking to compel disclosure of confidential commercial information, the FOIA Officer shall promptly notify the submitter of this action.

(f) *Exceptions to the notice requirements under this section.* The notice requirements under paragraphs (a) and (b) of this section shall not apply if:

- (1) The FOIA Officer determines that the information should not be disclosed;
- (2) The information lawfully has been published or officially made available to the public;
- (3) Disclosure of the information is required by law (other than the FOIA);
- (4) The information requested is not designated by the submitter as exempt from disclosure in accordance with this part, when the submitter had the opportunity to do so at the time of submission of the information or within a reasonable time thereafter, unless the agency has substantial reason to believe that disclosure of the information would result in competitive harm; or
- (5) The designation made by the submitter in accordance with this part appears obviously frivolous. When the FOIA Officer determines that a submitter was frivolous in designating information as confidential, the FOIA Officer must provide the submitter with written notice of any final administrative disclosure determination within a reasonable number of days prior to the specified disclosure date, but no opportunity to object to disclosure will be offered.

§517.6 Response to requests for records.

(a) *Initial determinations.*

(1) The FOIA Officer shall make an initial determination regarding access to the requested information and shall so notify the requester within ten (10) working days after receipt of the request. This 10-day period may be extended ten (10) additional working days if unusual circumstances arise. If an extension is necessary, the FOIA Officer shall promptly notify the requester of the extension, briefly stating the reasons for the extension, and estimating when the FOIA Officer will respond. Unusual circumstances warranting extension are:

(i) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) The need to search for, collect, and appropriately examine a voluminous amount of records which are demanded in a single request; or

(iii) The need for consultation with another agency having a substantial interest in the determination of the request, which consultation shall be conducted with all practicable speed.

(2) If the FOIA Officer decides that an initial determination cannot be reached within the time limits specified in paragraph (a)(1) of this section, he or she shall notify the requester of the reasons for the delay and include an estimate of when a determination will be made.

3) If no initial determination has been made at the end of the 10-day period provided in paragraph (a)(1) of this section, including any extension, the requester may appeal the action to the FOIA Appeals Officer.

(4) If the FOIA Officer determines that another agency is responsible for responding to a request or part thereof, the FOIA Officer shall refer such request to the appropriate agency. The FOIA Officer shall inform the requester of the referral and of the name and address of the agency or agencies to which the request has been referred.

(b) *Granting of requests.* When the FOIA Officer determines that the requested records shall be made available, he or she shall:

(1) Provide copies of the requested records; or

(2) Notify the requester of his or her decision, including a brief statement of when and how the records will be provided. Requested records shall then be promptly made available.

(c) *Denial of requests.* When the FOIA Officer determines that access to requested records should be denied, he or she shall notify the requester of the denial, the grounds for withholding the records, and the procedures for appeal of the denial.

§517.7 Appeals.

(a) *Right of appeal.* A requester may appeal to the FOIA Appeals Officer any adverse determination.

(b) *Notice of appeal.*

(1) *Time for appeal.* An appeal must be received no later than thirty (30) working days after notification of denial of access or after the time limit for response by the FOIA Officer has expired.

(2) *Form of appeal.* An appeal shall be initiated by filing a written notice of appeal. The notice shall be accompanied by copies of the original request and the initial denial. To expedite the appellate process and give the requester an opportunity to present his or her arguments, the notice should contain a brief statement of the reasons why the requester believes the initial denial to have been in error. The appeal shall be addressed to the Freedom of Information Act Appeals Officer, National Indian Gaming Commission, 1850 M St., NW., suite 250, Washington, DC 20036.

(c) *Final agency determinations.* The FOIA Appeals Officer shall issue a final written determination, stating the basis for its decision, within twenty (20) working days after receipt of a notice of appeal. If the determination is to provide access to the requested records, the FOIA Officer shall make those records immediately available to the requester. If the determination upholds the denial of access to the requested records, the FOIA Appeals Officer shall notify the requester of the determination and the right of the requester to obtain judicial review in the appropriate federal district court.

§517.8 Fees.

(a) *In general.* Fees pursuant to the FOIA shall be assessed according to the schedule contained in paragraph (b) of this section for services rendered by the Commission in response to requests for records under this part. All fees shall be charged to the requester, except where the charging of fees is limited under paragraph (d) of this section or where a waiver or reduction of fees is granted under paragraph (c) of this section. Requesters shall pay fees by check or money order made payable to the Treasury of the United States.

(b) *Charges for responding to FOIA requests.* The following fees shall be assessed in responding to requests for records submitted under this part, unless a waiver or reduction of fees has been granted pursuant to paragraph (c) of this section:

(1) *Copies.* The Commission shall charge \$0.10 per page for copies of documents up to 8 1/2 inch x 14 inch. For copies prepared by computer, the Commission will charge actual costs of production of the computer printouts, including operator time. For other methods of reproduction, the Commission shall charge the actual costs of producing the documents.

(2) *Searches.*

(i) *Manual searches.* Whenever feasible, the Commission will charge at the salary rate (basic pay plus a percent for benefits) of the employee or employees performing the search. However, where a homogenous class of personnel is used exclusively in a search (e.g. all administrative/clerical or all professional/executive), the Commission shall charge \$12.50 per hour for clerical time and \$30.00 per hour for professional time. Charges for search time less than a full hour will be in increments of quarter hours.

(ii) *Computer searches.* The Commission will charge the actual direct costs of conducting computer searches. These direct costs shall include the cost of operating the central processing unit for that portion of operating time that is directly attributable to searching for requested records, as well as the costs of operator/programmer salary apportionable to the search. The Commission is not required to alter or develop programming to conduct searches.

(3) *Review fees.* Review fees shall be assessed only with respect to those requesters who seek records for a commercial use under paragraph (d)(1) of this section. Review fees shall be assessed at the same rates as those listed under paragraph (b)(2)(i) of this section. Review fees shall be assessed only for the initial record review, for example, review undertaken when the Commission analyzes the applicability of a particular exemption to a particular record or portion thereof at the initial request level. No charge shall be assessed at the administrative appeal level of an exemption already applied.

(c) *Statutory waiver.* Documents shall be furnished without charge or at a charge below that listed in paragraphs (b) of this section where it is determined, based upon information provided by a requester or otherwise made known to the FOIA Officer, that disclosure of the requested information is in the public interest. Disclosure is in the public interest if it is likely to contribute significantly to public understanding of government operations and is not primarily for commercial purposes. Requests for a waiver or reduction of fees shall be considered on a case by case basis. In order to determine whether the fee waiver requirement is met, the FOIA Officer shall consider the following six factors:

(1) *The subject of the request.* Whether the subject of the requested records concerns the operations or activities of the government;

(2) *The informative value of the information to be disclosed.* Whether the disclosure is likely to contribute to an understanding of government operations or activities;

(3) *The contribution to an understanding of the subject by the general public likely to result from disclosure.* Whether disclosure of the requested information will contribute to public understanding;

(4) *The significance of the contribution to public understanding.* Whether the disclosure is likely to contribute significantly to public understanding of government operations or activities;

(5) *The existence and magnitude of commercial interest.* Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so

(6) *The primary interest in disclosure.* Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

(d) *Types of requesters.* There are four categories of FOIA requesters: commercial use requesters, educational and non-commercial scientific institutional requesters, representatives of the news media, and all other requesters. These terms are defined in §517.2. Specific levels of fees are prescribed below for each of these categories.

(1) *Commercial-use requesters.* The FOIA Officer shall charge commercial use requesters the full direct costs of searching for, reviewing, and duplicating requested records.

(2) *Educational and non-commercial scientific institution requesters.* The FOIA Officer shall charge educational and non-commercial scientific institution requesters for document duplication only, except that the first 100 pages of copies shall be provided without charge.

(3) *News media requesters.* The FOIA Officer shall charge news media requesters for document duplication costs only, except that the first 100 pages of paper copies shall be provided without charge.

(4) *All other requesters.* The FOIA Officer shall charge requesters who do not fall into any of the above categories fees which recover the full reasonable direct costs incurred for searching for and reproducing records if that total cost exceeds \$15.00, *except that* the first 100 pages and the first two hours of manual search time shall not be charged. To apply this term to computer searches, the FOIA Officer will determine the total hourly cost of operating the central processing unit and the operator's salary (plus 16 percent for benefits). When the cost of the search equals the equivalent dollar amount of two hours of the salary of the person performing the search, the FOIA Officer will begin assessing charges for the computer search.

(e) *Charges for unsuccessful searches.* Ordinarily, no charge will be assessed when requested records are not found or when the records located are withheld as exempt. However, if the requester has been notified of the estimated cost of the search time and has been advised specifically that the requested records may not exist or may be withheld as exempt, fees may be charged.

(f) *Charges for interest.* The FOIA Officer may assess interest charges on an unpaid bill, accrued under previous FOIA request(s), starting on the 31st day following the day on which the bill was sent to the requester. A fee received by the FOIA Officer, even if not processed, will result in a stay of the accrual of interest. The Commission shall follow the provisions of the Debt Collection Act of 1982 and the implementing procedures to recover any indebtedness owed to the Commission.

(g) *Aggregating requests.* A requester or a group of requesters may not submit multiple requests at the same time, each seeking portions of a document or documents solely in order to avoid payment of fees. When the Commission reasonably believes that a requester is attempting to divide a request into a series of requests to evade an assessment of fees, the Commission may aggregate such request and charge accordingly.

(h) *Advance payment of fees.* Fees may be paid upon provision of the requested records, except that payment may be required prior to that time if the requester has previously failed to pay fees or if the FOIA Officer determines the total fee will exceed \$250. When payment is required in advance of the processing of a request, the time limits prescribed in §517.6 shall not be deemed to begin until the FOIA Officer has received payment of the assessed fee.

(i) *Payment of fees.* Where it is anticipated that the cost of providing the requested record will exceed \$25.00 after the free duplication and search time has been calculated, and the requester has not indicated in advance a willingness to pay a fee greater than \$25.00, the FOIA Officer shall promptly notify the requester of the amount of the anticipated fee or a portion thereof, which can readily be estimated. The notification shall offer the requesting party an opportunity to confer with agency representatives for the purpose of reformulating the request so as to meet the requester's needs at a reduced cost.